Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-504 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 210(b) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, waives the sovereign immunity of the United States from damages liability that is not based on an alleged taking of property for a public purpose.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 773 F.2d 322. The opinion of the district court (Pet. App. 9a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1985 (Pet. App. 1a). On August 7, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 25, 1985. The petition was filed on September 24, 1985. The jurisdiction of this Court is invoked un-

der Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), which incorporates by reference Section 211 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note.[1]

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[1] The petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of ESA, 12 U.S.C. (1976 ed.) 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code * * *.

This judgment of the court of appeals was entered on July 26, 1985, and the petition was not filed until September 24, 1985. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to Temporary Emergency Court of Appeals (TECA) cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980).

STATEMENT

1. The Department of the Interior (DOI) grants oil and gas leases on federally owned lands and offshore properties under the Mineral Lands Leasing Act, 30 U.S.C. (& Supp. I) 181 *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in value or in kind. 30 U.S.C. 192; 43 U.S.C. 1353. If the Secretary elects to take royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 30 U.S.C. 192; 43 U.S.C. 1334; Pet. App. 2a n.1.

Petitioner is a small refiner of crude oil. In 1973 and 1980, petitioner entered into several contracts with the United States, through the United States Geological Survey, a sub-agency of the DOI, to purchase oil produced from offshore and onshore tracts in which the DOI had a royalty interest. During the period prior to January 21, 1981, regulations issued by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, established a complex petroleum pricing structure, which included categories or "tiers" of crude oil as well as maximum prices for each tier. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). In general, "old oil," *i.e.*, oil being produced in volumes less than historic production levels, could be sold at a specified "lower tier" price. By contrast,

"new oil," *i.e.*, oil produced from new sources or from old sources in excess of historic production levels, could be sold at higher "upper tier" rates. Beginning in 1979, certain categories of oil were decontrolled and could be sold at market rates. The regulations required producers to certify to their customers the volumes of oil purchased in each tier within a specified time. 10 C.F.R. 212.72, 212.131 (1979); Pet. App. 2a, 14a-15a.[2] The control of petroleum pricing ended on January 27, 1981. Exec. Order No. 12,287, 46 Fed. Reg. 9909.

2. a. On December 5, 1983, petitioner filed suit in the United States District Court for the Western District of Louisiana. Petitioner alleged that the DOI had sold petitioner oil at a price in excess of the maximum lawful price allowed by the DOE's regulations and sought a "refund" of more than $6 million, as well as treble damages.[3] Petitioner claimed that the DOI's certifications were untimely and allegedly improper in form and therefore that all of the royalty oil that it purchased from the government should be deemed to be "old oil" and sold only at the lower tier price, even if the oil in fact was "new" or "uncontrolled" oil. Petitioner did not allege that the oil that it had purchased did not otherwise qualify for the price category billed by the agency, or that

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[2] The regulatory structure and certification process are comprehensively discussed in *Department of the Interior—Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) ¶ 81,012 (1984).

[3] Approximately 99% of petitioner's damages claim was based on the DOI's allegedly improper certification of the royalty crude oil. The remainder was for allegedly improper administrative fees, surcharges, and transportation charges. See Pet. App. 15a.

petitioner would not have paid the same purchase price had the certifications been timely or in a different form. Pet. App. 3a, 15a. Moreover, petitioner did not allege that it was unaware of the timing or the form of the DOI's certifications when they were received. At no time did petitioner bring any of its claims to the agency's attention and pursue its administrative remedies, as both its contracts with the DOI and the DOI's regulations allowed (see 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4). Petitioner also did not allege that it had reported this supposed violation to the DOE, as the DOE's regulations required. See 10 C.F.R. 212.131(c) (1979). Instead, petitioner took its oil and paid each invoice upon receipt without protest and then waited more than two years after the decontrol of crude oil prices before bringing this suit.

b. On December 4, 1984, the district court dismissed petitioner's complaint on the ground that it was barred by the applicable state limitations period, La. Civ. Code Ann. art. 3536 (West 1953) (Pet. App. 14a-17a).[4] The district court denied petitioner's motion for reconsideration (*id.* at 9a-11a), and petitioner appealed to the Temporary Emergency Court of Appeals.

3. The court of appeals affirmed on the ground that petitioner's claims were barred by sovereign immunity (Pet. App. 3a-8a). Relying upon its prior decision in *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, cert.

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[4] The Temporary Emergency Court of Appeals had previously ruled that the most analogous state statute of limitations should apply to suits brought under the ESA and EPAA, since neither statute contains a federal statute of limitations. *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (1982); cf. *Wilson* v. *Garcia*, No. 83-2146 (Apr. 17, 1985).

denied, 439 U.S. 831 (1978), the court held that Section 210 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, which creates civil remedies for violations of the oil price regulations, does not provide a cause of action against the United States except in takings cases, which this case does not involve (Pet. App. 5a). The court also rejected petitioner's claim that this action could be brought under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491(a)(1), on the ground that Section 211 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, vests exclusive jurisdiction over claims brought under the EPAA in the district courts, not in the Claims Court (Pet. App. 7a). Finally, again relying on *McCulloch*, the court of appeals rejected petitioner's argument that Section 211 creates an exception to the district court's jurisdiction under the Tucker Act (Pet. App. 7a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court denied a petition for a writ of certiorari in *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 439 U.S. 831 (1978), that presented the same question, and nothing has changed since then that warrants different treatment of the petition in this case. Moreover, petitioner has not shown that the district court erred by dismissing petitioner's complaint under the applicable statute of limitations, which provides an independent and adequate basis for the judgment below. Accordingly, there is no reason for this Court to review petitioner's claims.

Petitioner errs in contending (Pet. 16-17) that Sections 210 and 211 of the ESA waive the sovereign

immunity of the United States from the damages claim asserted in its complaint.[5] A waiver of the United States' sovereign immunity must be express and unambiguous. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969). The ESA does not in terms expressly waive the sovereign immunity of the United States; nor does it implicitly have that effect. Section 210 creates a cause of action for a violation of the oil pricing regulations, and Section 211 vests jurisdiction over such claims in the district courts. Although Section 210 provides a cause of action against any "person" who violates the price controls, the court of appeals correctly held (Pet. App. 4a) that this term does not include the United States. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941); cf. *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 11. Moreover, the legislative history of the ESA makes clear that "[t]he Government will not * * * be the subject of" an action under Section 210. S. Rep. 92-507, 92d Cong., 1st Sess. 9 (1971). Lastly, as the court of appeals noted (Pet. App. 4a), Congress's adoption of a treble damages remedy in Section 210(b) "makes it all the more obvious that Congress did not intend by implication to waive sovereign immunity." Accord *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d at 714-718; *id.* at 718-719 (Christensen, J., concurring).[6]

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[5] While nominally brought against the DOI, petitioner's suit is in actuality against the United States, since a judgment in petitioner's favor "would expend itself on the public treasury" (*Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citation omitted)). See 30 U.S.C. (Supp. I) 191; 43 U.S.C. 1338.

[6] None of the district court decisions on which petitioner relies (Pet. 17) cites the legislative history of Section 210

In the alternative, petitioner claims (Pet. 10-14) that it has an independent remedy under the Tucker Act for an "unlawful exaction" or for a breach of contract and that the court of appeals erred by ruling that the ESA implicitly repealed the Tucker Act. That argument is misdirected. In the first place, petitioner's damages claim, however characterized, rests entirely upon its allegation that the DOI violated the DOE's regulations by untimely or improperly certifying the oil that petitioner purchased; petitioner essentially concedes as much (Pet. 8). Petitioner's claim thus necessarily "aris[es] under" the EPAA and the ESA (12 U.S.C. (1976 ed.) 1904 note), and, given the comprehensive remedies established by the ESA (see *McCulloch*, 577 F.2d at 714-718), those remedies are exclusive (see, *e.g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)). Indeed, petitioner could not bring suit in district court if its claim did not "aris[e] under" the EPAA and ESA, because ESA Section 211 does not provide the district courts with jurisdiction to resolve alleged breach of contract or "unlawful exaction" claims. Accordingly, petitioner cannot avoid the fact that its claim is based upon ESA Section 210 simply by recasting that claim as one for a breach of contract.

Furthermore, as the Court explained in *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (citations omitted), "the Tucker Act 'does not create

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discussed by the court of appeals (Pet. App. 4a-5a). In the absence of a conflict among the circuits, the issue does not warrant review by this Court. Additionally, petitioner's claim (Pet. 9) that the United States waived its immunity by engaging in commercial transactions was correctly rejected by the court of appeals (Pet. App. 6a). See *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947).

any substantive right enforceable against the United States for money damages' [,] * * * [and any] substantive right must be found in some other source of law." For the reasons given above, Section 210 " 'can[not] fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (463 U.S. at 217 (citations omitted)). Therefore, petitioner has failed to state a claim for damages that is compensable under the Tucker Act. In any event, petitioner brought suit under the ESA, not the Tucker Act (see Pet. App. 14a). In fact, petitioner could not have brought suit in district court under the Tucker Act, since petitioner's claim exceeded the jurisdictional limitation that the Tucker Act imposes on the district courts. Thus, the Tucker Act by its terms is inapplicable here.[7]

Petitioner erroneously asserts (Pet. 12-13) that the court of appeals' decision conflicts with *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Both decisions simply concluded that later enacted statutes did not withdraw a Tucker Act remedy that was otherwise available for allegedly unconstitutional takings of property. *Ruckelshaus* v. *Monsanto Co.*, slip op. 28-30; 419 U.S. at 134-136. Because the ESA does not provide petitioner with a cause of action against the United States, petitioner has no remedy that can be enforced under the Tucker Act. For the same reason, *Hatzlachh Supply Co.* v.

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[7] Petitioner's claim (Pet. 11) that the ESA impliedly modified the Tucker Act by allowing suit to be brought in any district court is flawed. Petitioner has failed to identify anything in the text or legislative history of the ESA demonstrating a " 'clear and manifest' " congressional intent to repeal the Tucker Act's jurisdictional limitations (*Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (citation omitted)).

United States, 444 U.S. 460 (1980), does not support petitioner's argument. *Hatzlachh* simply held that the Federal Tort Claims Act exemptions did not withdraw a party's preexisting remedies under the Tucker Act. The question here, however, is whether petitioner had a cause of action under the ESA to begin with. Nor does the court of appeals' decision conflict with *United States* v. *Mitchell*, *supra*. *Mitchell* expressly noted that "[n]ot every claim invoking * * * a federal statute * * * is cognizable under the Tucker Act" (463 U.S. at 216) and that "[a] claimant must demonstrate that the source of substantive law he relies upon" requires compensation (*id.* at 216-217). The court of appeals correctly held that a claim based on the ESA is not a claim that requires the United States to pay compensation and thus cannot be presented under the Tucker Act.[8]

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[8] Petitioner also errs in claiming (Pet. 11) that the decision below conflicts with *Munoz* v. *Small Business Administration*, 644 F.2d 1361 (9th Cir. 1981); *Mar* v. *Kleppe*, 520 F.2d 867 (10th Cir. 1975); *Robinson* v. *United States*, 551 F. Supp. 1120 (M.D. La. 1982); and *Selected Risks Insurance Co.* v. *Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976). These cases held that the Small Business Administration (SBA) can be sued in district court, not the Court of Claims, for damages in excess of $10,000 because 15 U.S.C. 634(b)(1) expressly provides that the SBA may be sued in any court. The decision below also does not conflict with *Mohawk Petroleum Corp.* v. *Department of Navy*, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975). As the court of appeals noted (Pet. App. 5a), that decision did not present any question whether the United States had waived its sovereign immunity from damages liability. In any event, any intracircuit conflict is for the court of appeals to resolve, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner's alternative suggestion (Pet. 13-14)—that this suit should be transferred to the Claims Court—should also

Finally, review by the Court is also unwarranted because the question presented by petitioner is largely of historical, not current, importance. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Moreover, the DOE is likely to correct any technical defect in the DOI's certification forms by retroactively granting the DOI an exemption from the applicable requirements; in fact, the DOE has already done so on an identical claim. *Department of the Interior—Laketon Asphalt Refining, Inc.* 12 Energy Mgmt. (CCH) ¶ 81,012 (1984).[9] The DOI has filed an exception application with the DOE that would apply to the DOI's sales to petitioner. Accordingly, petitioner's claims, which are based upon purely technical defects in the DOI's certification forms and which involve regulations no longer in effect, do not warrant review by this Court.[10]

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be rejected. As the court of appeals noted (Pet. App. 7a), the Court of Claims (whose decisions are binding on the Federal Circuit, see *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982)) has held that Section 211 of the ESA provides the district courts with exclusive jurisdiction over Section 210 claims. *The Poole & Kent Co.*, 214 Ct. Cl. 836 (1977); *Metsch* v. *United States*, 493 F.2d 1232 (Ct. Cl. 1974). That ruling is consistent with the court of appeals' holding in this case. Accord *Municipal Elec. Util. Ass'n* v. *FPC*, 485 F.2d 967, 970 (D.C. Cir. 1973); *Municipal Intervenors Group* v. *FPC*, 473 F.2d 84, 88-91 (D.C. Cir. 1972).

[9] Review of that decision has been sought in *Laketon Asphalt Refining, Inc.* v. *DOE*, Civ. No. EV 84-264-C (S.D. Ind.).

[10] Amici erroneously claim (Howell Amicus Br. 7-8) that Congress waived the government's sovereign immunity in the Federal Oil and Gas Royalty Management Act of 1982

(FOGRMA), 30 U.S.C. 1701 *et seq.*, in two ways: by declining specifically to exempt the DOI from suits brought under the ESA, and by adopting an accounting procedure under which the states would be charged a pro rata share of any overcharge award entered against the government (30 U.S.C. 1721(e)). Both claims are mistaken. Congress declined to adopt a specific exemption for the DOI because the DOI's proposal was beyond the scope of the legislation under consideration, not because Congress intended to waive sovereign immunity. S. Rep. 97-512, 97th Cong., 2d Sess. 20 (1982). The legislative history of 30 U.S.C. 1721(e) also makes clear that this provision does not waive sovereign immunity. See 128 Cong. Rec. S13939-13940 (daily ed. Dec. 6, 1982) (section-by-section analysis by Sen. McClure, Chairman of the Committee on Energy and Natural Resources, which had reported the bill) ("[t]his provision is designed solely to avoid any hardship for the States. It is not intended to be a waiver of the Federal government's immunity against suits for overcharges or other alleged violations of the mandatory price and allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, as amended."). Third, as the DOE noted in *Laketon*, at most Congress declined to exempt the DOI from *substantive* violations of the ESA, not formalistic ones. Here, as in *Laketon*, the overcharge claim "relates only to the *timing* and other formalistic aspects of [the DOI's] certifications, not to their substantive validity" (*Department of the Interior-Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) at 82,557 (emphasis in original)). In any event, petitioner did not allege in its complaint that the DOI had violated this statute.

Amici also erroneously assert (Howell Amicus Br. 2, 13-15); Laketon Amicus Br. 7) that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, apply to this case. OCSLA applies only to offshore oil, and 43 U.S.C. 1349(a)(1) does not repeal ESA Sections 210 and 211 in this respect. Rather, that provision only authorizes injunctive relief and only for an alleged "violation of any provision of this subchapter * * *" or its implementing regulations. The provision does not waive the sovereign immunity of the United States from damages liability. When Congress intended to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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waive the United States' sovereign immunity from damages, Congress did so in express terms. See 43 U.S.C. 1352(f)(1) (revelation of information in violation of confidentiality regulations allows affected party to "commence a civil action for damages in the appropriate district court * * * against the Federal Government * * *"). There is no analogous waiver here.

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